IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GARRY F. MCCARTHY, Superintendent of Police of the City of Chicago,	)	
Plaintiff,	)	
v.	)	No. 2015 CH 00723
ADIS KLINCEVIC and THE POLICE BOARD OF THE CITY OF CHICAGO,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Garry F. McCarthy, is the Superintendent of Police of the City of Chicago. Plaintiff seeks administrative review of a final administrative decision of the Defendant Police Board of the City of Chicago (the "Board"). The Board's decision ordered the reinstatement of Defendant, Officer Adis Klincevic's, employment with the City Police Department (the "Department"). Officer Klincevic was charged with violating several Department rules after testing positive for anabolic steroids through compelled urinalysis. In its decision, the Board concluded that the results of Officer Klincevic's drug test must be suppressed in administrative proceedings because they were obtained by an unconstitutional search. Specifically, the Board found that an uncorroborated, anonymous tip was not sufficient to establish reasonable suspicion that Officer Klincevic was using drugs, as necessary to compel a government employee to submit to non-random drug screening under the Fourth Amendment. *See, e.g. Ford v. Dowd*, 931 F.2d 1286, 1289-90 (8th Cir. 1990). The Board found the remaining evidence insufficient to support the charges.

On administrative review, the Plaintiff argues that the Board clearly erred when it

concluded that the Department lacked reasonable suspicion to compel Officer Klincevic to submit a urine sample. In support, Plaintiff argues that the anonymous tip contained sufficient indicia of reliability to establish reasonable suspicion without corroboration. Alternatively, the Plaintiff argues that the exclusionary rule should not apply because the public interest in an unimpaired police force outweighs any likelihood that future constitutional violations would be deterred by suppression of the evidence.

The Court has reviewed the record and the briefs. It has also considered the parties' oral arguments. For the reasons stated herein, the Board's decision is affirmed in part and reversed in part. The Court finds that the Board did not clearly err in determining that the Department lacked reasonable suspicion to compel Officer Klincevic to submit to a drug test. Absent reasonable suspicion, Officer Klincevic's Fourth Amendment rights were violated.

However, the Court finds that the Board erred as matter of law when it determined that the exclusionary rule is applicable in these administrative proceedings. The Court is bound by *Grames v. Illinois State Police*, 254 Ill. App. 3d 191, 201-202 (4th Dist. 1993), which holds that the exclusionary rule is not applicable in police discharge proceedings because any deterrent effect of exclusion is outweighed by the public interest in an effective police force. Accordingly, this matter is remanded to the Board for consideration of Officer Klincevic's test results.

Background

The relevant facts are not in dispute. On or about October 22, 2012, the Chicago Police Department's Bureau of Internal Affairs received an anonymous letter stating that Officer Klincevic was habitually using steroids in furtherance of body-building aspirations. (R. at 113). The letter further stated that Officer Klincevic predominantly purchased his steroids from personal trainers at XSport Gym franchises located throughout metropolitan Chicago. (*Id.*)

According to the letter, Officer Klincevic's steroid use had eluded detection by the Department's random drug testing program because Officer Klincevic had received advance warning of the testing dates. (*Id.*) The letter further asserted that Officer Klincevic may have submitted urine samples that were not his own and that he had ingested commercially available masking agents to avoiding testing positive for steroid use. (*Id.*) The letter urged the Department to re-test Officer Klincevic prior to November 1, 2012 because he would begin ingesting masking agents after that date in anticipation of a drug test for a body-building competition in November. (*Id.*)

In response to the anonymous tip, the Department sent officers to Officer Klincevic's house with orders to immediately report to the station precinct for urine testing. (R. at 268). Officer Klincevic was advised that if he did not immediately submit to a urine test, the Department would initiate administrative termination proceedings. (R. at 274).

The Department concededly made no effort to corroborate the accusations contained in the anonymous letter. (R. at 270-74). Lieutenant Frederick Melean testified that the urine test was ordered solely based on the anonymous letter because "it was a very detailed letter including how long he was body building, what day was the next competition, use of masking agents. It wasn't just a plain letter saying I think this person is using steroids. It seemed to us that that this person has some intimate knowledge of what was going on." (R. at 268-69). Lieutenant Melean further testified, "Based on the letter we determined that we had enough information to believe that the officer was using steroids." (R. at 274).

Officer Klincevic submitted a urine sample, which tested positive for various anabolic steroid metabolites. Consequently, the Police Department initiated administrative proceedings before the Board to terminate Officer Klincevic's employment. Officer Klincevic was charged with violating the following Department rules:

Rule 1: Violation of any law or ordinance. (here, 720 ILCS 570/402(d))

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department.

Rule 6: Disobedience of an order or directive, whether written or oral

(R. at 003). An administrative hearing on the charges took place before the Board on August 12, August 26, and October 1, 2014. (R. at 007).

Aside from Lieutenant Melean, the bulk of witnesses offered medical testimony about the results and reliability of the urinalysis. Officer Klincevic's personal physician, Dr. Mark Levy, testified that the positive test results may have been caused by impurities in dietary supplements and drugs that had been lawfully prescribed. In rebuttal, the Department's Medical Review Officer, Dr. Shirley Conibear, testified that any impurities in Officer Klincevic's prescriptions would consist of organic solvents that would not trigger a positive test result for anabolic steroids.

At some point during the administrative proceedings, Officer Klincevic filed a motion to suppress all evidence stemming from the drug test on grounds that his urine sample was obtained by unconstitutional search. Officer Klincevic concurrently moved to dismiss all charges.

The Board's final administrative decision granted Officer Klincevic's motion to suppress, finding that the anonymous tip letter, by itself and without corroboration, did not establish the reasonable suspicion necessary to authorize the search under the Fourth Amendment. A majority of the Board further found that exclusion of the test results was necessary to deter future constitutional violations by the Department in the administration of their drug testing program. The Board then denied Officer Klincevic's Motion to Dismiss, but nonetheless ruled that the

remaining evidence was not sufficient to support the charges. A minority of the Board members filed a dissenting opinion, arguing that the results of Officer Klincevic's urinalysis should not have been excluded because suppression would harm the public by allowing an impaired officer to patrol the streets.

Statement of Jurisdiction and Standard of Review

Decisions of the Police Board are reviewable by the circuit court under the provisions of the Administrative Review Law. *Lockett v. Chicago Police Bd.*, 133 Ill. 2d 349, 352 (1990); 735 ILCS 5/3-101 *et seq*. On administrative review, the court has the power to review all questions of fact and law presented by the administrative record. *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 271 (2004). "[A] Petitioner in an administrative proceeding bears the burden of proof, and relief will be denied if he or she fails to sustain that burden." *Wade v. City of N. Chicago Police Pension Bd.*, 266 Ill. 2d 485, 505 (2007). The reviewing court must base its review on the administrative record and cannot consider evidence outside it. *Lyon*, 209 Ill. 2d at 271.

A court reviews pure questions of fact under an against the manifest weight of evidence standard, pure questions of law under a *de novo* standard, and mixed questions of law and fact under a clearly erroneous standard. *Preuter v. State Officers Electoral Bd.*, 334 Ill. App. 3d 979, 987 (1st Dist. 2002). A finding is not contrary to the manifest weight of the evidence unless the court determines all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous and that the opposite conclusion is clearly evident. *Raitzik v. Bd. Of Educ.*, 356 Ill. App. 3d 813, 824 (1st Dist. 2005). A mixed question of law and fact exists when the court is asked to examine the legal effects of a given set of facts. *Filskov v. Bd. of Trustees of the*

Northlake Police Pension Fund, 409 Ill. App. 3d 66, 69 (1st Dist. 2011). "The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently" are not grounds for reversal. *Robbins v. The Board of Trustees of the Carbondale Police Pension Fund*, 177 Ill. 2d 533, 538 (1997). The agency's decision should be upheld if there is evidence in the record to support its decision. *Abrahamson v. Ill. Dept. of Prof. Regulation*, 153 Ill. 2d 76, 88 (1992).

Constitutionality of the Search

The first issue presented for review is the constitutionality of the drug test. The United States Supreme Court has held that compelled urinalysis for the purpose of detecting illegal drug use by government employees are searches subject to the reasonableness requirement of the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989). When a drug test is not conducted pursuant to uniform, random, or otherwise non-discretionary employment policy, the search must be supported by a reasonable, articulable, and individualized suspicion that the government employee has been using drugs. *Ford v. Dowd*, 931 F.2d 1286, 1289-90 (8th Cir. 1990); *Jackson v. Gates,* 975 F.2d 648, 652-43 (9th Cir. 1992); *Benavidez v. City of Albuquerque*, 101 F.3d 620, 624 (10th Cir. 1996); *Fraternal Order of Police, Lodge No. 5 v. Tucker*, 869 F.2d 74, 77 (3rd Cir. 1988).

Like probable cause, the existence of reasonable suspicion must be considered in light of the totality of the circumstances and is dependent upon both the content of information possessed by the police at the time of the search and the degree of the information's reliability. *Alabama v. White*, 496 U.S. 325, 330 (1990). Less, however, is required to demonstrate reasonable suspicion than probable cause. *Id.*

Despite the relaxed standard, anonymous tips are generally insufficient to support reasonable suspicion due to their inherent unreliability. *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014); *Florida v. J.L.*, 529 U.S. 266, 271 (2000); *White*, 496 U.S. at 329; *People v. Kline*, 355 Ill. App. 3d 770, 776 (3rd Dist. 2005). Unlike known informants, whose credibility can be assessed, anonymous tips "seldom demonstrate the informant's basis of knowledge or veracity." *Florida v. J.L.*, 529 U.S. at 270. Further, as stated by Justice Kennedy,

> If the [tip] is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

Id. (J. Kennedy concurring).

Although the law expresses skepticism toward anonymous informants, an anonymous tip may yet give rise to reasonable suspicion—and even probable cause—provided that the content of the information sufficiently quells concerns about its reliability. *See Illinois v. Gates*, 462 U.S. 213, 245 (1982); *see also White*, 496 U.S. at 330 ("[I]f a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable.") Accordingly, when the assertion of reasonable suspicion is based solely on an anonymous informant's tip, relevant factors include the detail of the tip, whether the tip established the basis of knowledge, whether the informant indicated that he or she witnessed any criminal activity, and whether the tip accurately predicts future activity of the suspect. *Kline*, 355 Ill. App. 3d at 776.

Applying these factors, the Board concluded that the anonymous tip here lacked sufficient indicia of reliability to support a reasonable suspicion that Officer Klincevic was using steroids. Absent reasonable suspicion, the Board held that the drug test violated Officer Klincevic's Fourth Amendment rights.

The Board's determination that the anonymous tip here was insufficient to establish reasonable suspicion required the Board to examine the legal effect of a given set of facts. The issue accordingly presents a mixed question of law and fact, and the Board's conclusion is reviewed for clear error.

The Board's findings on this issue were not clearly erroneous. The material allegations of the letter begin with a statement that "Officer Klincevic has been confirmed to be currently in possession of controlled substances and performance enhancing drugs," but the letter offers no basis for the informant's knowledge, such as *how* the informant had "confirmed" Officer Klincevic's steroid possession and use. Along these lines, the letter also fails to disclose whether the informant had actually witnessed any of the activity described.

Next, although the letter contains a number of details about Officer Klincevic's alleged suppliers and past and future body-building activities, the Department concededly made no effort to verify or corroborate those details before ordering Officer Klincevic to submit to a drug test. Under these circumstances, the anonymous letter's content was not sufficient to allay constitutional concerns about its reliability. Accordingly, the Board did not err in concluding that the letter failed to establish reasonable suspicion.

Plaintiff cites to a number of cases to support his argument that reasonable suspicion can be established by an informant's tip, but in nearly all of these cases, the identity of the informant was known and not anonymous. *Hillard v. Bagnola*, 297 Ill. App. 3d 906, 919-20 (1st Dist. 1998) (finding reasonable suspicion of officer's cocaine use based on statements by officer's wife and daughter); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139, 1143-44 (3rd Cir. 1988) (finding reasonable suspicion that officer was using drugs based on allegation by the officer's girlfriend); *Wrightsell v. Chicago*, 678 F. Supp. 727, 732 (N.D. Ill. 1988) (finding

reasonable suspicion that officer was using drugs based on allegation by the officer's girlfriend); *Garrison v. Dept. of Justice*, 72 F.3d 1566, 1570 (Fed Cir. 1995) (finding reasonable suspicion based on statements by an employee's mentally ill brother). Accordingly, all of these cases are materially distinguishable. Plaintiff has not presented a single case where reasonable suspicion was established by an entirely uncorroborated anonymous tip.

Plaintiff also argues that the threshold of reasonableness should be lowered on account of Officer Klincevic's diminished expectation of privacy as a police officer responsible for public safety. Officer Klincevic's diminished expectation of privacy, however, is already taken into account in lowering the requisite search standard from probable cause to reasonable suspicion. *See Ford v. Dowd*, 931 F.2d 1286, 1291-92 (8th Cir. 1991).

In sum, the Board's finding that the drug test violated the Fourth Amendment was not clearly erroneous. The uncorroborated anonymous tip here did not contain sufficient indicia of reliability to establish reasonable suspicion necessary to authorize the search.

Applicability of the Exclusionary Rule

The next issue is whether the constitutional violation mandated exclusion of the search results in the termination proceedings. The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect. *United States v. Calandra*, 414 U.S. 338, 348 (1974). The rule is calculated to prevent future abuses by the state, rather than to repair past constitutional violations. *Elkins v. United States*, 364 U.S. 206, 217 (1960). It is not a personal constitutional right of an aggrieved party. *Calandra*, 414 U.S. at 348.

Because exclusion of illegally-seized evidence is not a personal constitutional right, the United States Supreme Court has held that the exclusionary rule does not bar the use of such evidence in all proceedings. *Id.* As such, courts have often declined to apply the exclusionary

rule in civil and administrative matters. *See People v. Dowery*, 62 Ill. 2d 200 (1975) (probation revocation proceeding); *U.S. Residential Management and Dev., LLC v. Head*, 397 Ill. App. 3d 156, 162-63 (1st Dist. 2009) (forcible detainer and entry proceeding); *McCullough v. Knight*, 293 Ill. App. 3d 591 (1st Dist. 1998) (vehicle impoundment proceeding); *Grames v. Ill. State Police*, 254 Ill App. 3d 191 (4th Dist. 1993) (administrative police discharge proceedings). Instead, the rule should only apply in non-criminal proceedings if the likelihood of future deterrence outweighs the societal costs imposed by exclusion. *See United States v. Janis*, 428 U.S. 433, 454 (1976).

Here, a majority of the Board determined that:

> [T]he exclusionary rule should apply to proceedings like these in which the Superintendent seeks the severe penalty of depriving a police officer of his job based solely on the results of an unconstitutional search. Applying the exclusionary rule here will serve to deter efforts to discharge police officers solely on the basis of unlawful searches, and ensure that in future cases some minimal effort will be made to corroborate anonymous tips before non-random drug tests are ordered. The opposite conclusion would open the gates to discharge cases based on unlawful drug testing, which the Police Board cannot condone.

(R. at 012). Two Board members filed a dissent, which argued that the requisite "balancing moves distinctly in favor of protecting the public from an impaired police officer. The costs of exclusion to the public are too high and the benefits are too minimal." (R. at 021).

The applicability of the exclusionary rule in administrative proceedings presents an issue of law that is reviewed *de novo*. *McCullough v. Knight*, 293 Ill. App. 3d 591, 594 (1st Dist. 1997).

In Illinois, the applicability of the exclusionary rule police discharge proceedings was analyzed by the Appellate Court in *Grames v. Illinois State Police*, 254 Ill. App. 3d 191, 201-202 (4th Dist. 1993). In that case, a police officer was found unconscious from a drug overdose in a

locked bathroom. *Id.* at 194. Strewn about her vicinity were various weapons, cocaine, and drug paraphernalia. *Id.* The Illinois State Police initiated termination proceedings before its merit board. *Id.* The officer moved to suppress the evidence on grounds that it was the product of an illegal search. *Id.* at 195.

Without reaching the constitutional merits of the officer's claim, the hearing officer denied the motion to suppress, reasoning that the exclusionary rule should not be applied in administrative proceedings. *Grames,* 254 Ill. App. 3d at 195-96. The appellate court affirmed:

> Balancing the factors in the present case, we agree with the hearing officer's conclusion [sic] the exclusionary rule should not be extended to encompass the present situation. The damage to the operation of an effective State police force would far outweigh any benefit which would result from application of the exclusionary rule. To extend the rule would effectively prohibit the introduction and consideration of relevant and probative evidence and hamper the Board's ability to enforce departmental rules and deter and punish inappropriate conduct. The instant hearing did not determine the guilt or innocence of plaintiff as in a criminal proceeding; it was an administrative proceeding evaluating whether her conduct amounted to a violation of departmental rules. Because we determine the exclusionary rule does not apply, we need not address the other arguments relating to whether plaintiff lacked standing to object to the search and whether the search was reasonable.

Id. at 201-02.

Grames is binding on this Court and resolves this issue. Under *Grames*' sweeping reasoning, any deterrent effect of exclusion in police discharge proceedings is "far outweigh[ed]" by the public interest in an effective police force and the enforcement of departmental rules. *Id.* at 201. Accordingly, the Board's application of the exclusionary rule in these administrative proceedings was contrary to law.

The Court acknowledges that *Grames* did not involve a factual scenario like the one present here, where the search was solely conducted for administrative employment purposes,

where there is no corollary criminal proceeding, and where the fruits of the search can only be used in termination proceedings. However, because *Grames* was deliberately decided without any consideration of the underlying search or the asserted constitutional violation, it effectively holds that the exclusionary rule is inapplicable in police discharge proceedings as a matter of law.

The Court has been apprised that Officer Klincevic may have alternative remedies available in a separate forum that could provide adequate safeguards against future Department misconduct. Officer Klincevic argued at the administrative level and in his brief here that the compelled urinalysis here violated the Department's collective bargaining agreement with the Fraternal Order of Police. Officer Klincevic has never, however, articulated the available remedies for breaches of the collective bargaining agreement, and a complete copy of the agreement was not included in the record for the Court's consultation. At oral argument, Plaintiff's counsel apprised the Court that breaches of the collective bargaining agreement would typically be asserted and decided in a union grievance proceeding. Suffice to say, Officer Klincevic has not adequately developed these arguments for the Court or established that they have been raised in the proper forum. If remedies are available under the agreement, however, they could independently serve to deter Department misconduct without need to resort to the exclusionary rule.

Conclusion

The Board's decision is affirmed in part and reversed in part. Although the Board did not err in concluding that the Department lacked reasonable suspicion to compel the drug test, the Board's decision to grant Officer Klincevic's Motion to Suppress was contrary to law.

IT IS THEREFORE ORDERED:

1) The portion of the Board's final administrative decision granting Officer Klincevic's Motion to Suppress is reversed as contrary to law;

2) This matter is remanded to the Board for further proceedings with instructions to consider the previously suppressed evidence and any other evidence that the Board deems fit.

ENTERED:

JUDGE RITA M. NOVAK

SEP 03 2015

Circuit Court-1741

_____
Date

_____
Rita M. Novak
Judge Presiding